FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 923

PETITIONERS' REPLY BRIEF

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IN THE

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JANICE WIENER, as Executrix of the Estate of Norton Wiener, Deceased, and Related Cases,

Petitioners,

vs.

UNITED AIR LINES, INC.

PETITIONERS' REPLY BRIEF.

Petitioners' Reply to Respondent's Argument.

Respondent's brief in opposition overlooks the principal vice of the opinion of the court of appeals. That opinion establishes as the law of the case that even the issue of normal compensatory damages cannot be tried separately from the issue of liability. No discretion is left to the district court in its conduct of the trial proceedings in these cases.

Respondent does not contend that the evidence relating to liability should affect in any way the amount of compensatory damages awarded. It merely speculates that the jury is more likely to render a verdict unfair to respondent if there are separate trials. This assumes that juries will not follow instructions with respect to the measure of compensatory damages, an as-

sumption based solely upon the bar assertion of the respondent.* If respondent's real concern is that a fair verdict on the issue of damages result, it would seem that reliance should be placed upon the trial court's exercise of its control over excessive or insufficient verdicts rather than to insist that one jury rather than two try the entire case.

Respondent contends that exemplary damages have not been effectively waived, relying upon the case of *Berry v. Chaplin,* 47 Cal. App. 2d 652, 169 P. 2d 442. In that case the court held that an agreement to dismiss a claim for child support in the event of an unfavorable blood test was not binding on the minor plaintiff. The *Berry* case is inapplicable. It is one thing for counsel to agree to give up the rights of a minor as was done in the *Berry* case; it is quite another for attorneys to decide that as part of their trial procedure and tactics it is to the advantage of the minor to have certain claims for damages pressed and others foregone. The first is a surrender of rights; the second involves judgment as to the best means of securing them. Certainly if counsel are of the opinion that a demand for exemplary damages may weaken their stand with respect to compensatory damages, it is not only their right but their duty to limit their claims to compensatory damages. This decision is as much within the perogative of counsel as specifying, and thereby nec-

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*Respondent cites two cases in which a retrial on the issue of damages alone resulted in substantial increases in the verdicts over the amounts awarded by a jury which had also heard the evidence of liability. (Brief in Opposition, p. 11.) These examples, rather than supporting respondent's position, would seem to support petitioners. The verdicts of the first jury were so low that a new trial was necessary on the issue of damages alone.

essarily limiting, the amount of the claim in the prayer of the complaint.

Respondent's argument that California Probate Code Section 578a requires court approval to insure effectiveness of the plaintiffs' statements limiting damages overlooks the express provisions of that section. Even if this code section were applicable, Respondent's argument concerning the binding effect upon minor heirs of the statements limiting damages is properly directed to the trial court. The decision of the court of appeals would deprive the trial court of the power to make any order respecting the limitation of damages that it might deem appropriate as a condition of separate trials on the issues of liability and compensatory damages.

As a consequence of its erroneous holding that in this case liability and normal compensatory damages cannot be fairly tried separately, the court of appeals appropriated to itself the exercise of discretion as to the best procedure for the trial of these cases, a discretion with which the trial court is properly vested.

Conclusion.

By reason of the foregoing, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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